

Internal Revenue Service

memorandum

CC:TL-N-1545-89

TS/JIROSENBERG

date: 09 JAN 1989

to: District Counsel, Brooklyn NA:BRK
Attn: Diane Mirabito

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject:

TL-R-505-87

ISSUE

What is the current National Office position regarding the proper calculation of the I.R.C. § 6700 penalty in light of Spriggs v. United States, No. 87-1651, slip op. (4th Cir. June 27, 1988) (unpublished opinion), aff'g 660 F. Supp. 789 (E.D. Va. 1987) and In Re Tax Refund Litigation, No. 732 (E.D.N.Y. Nov. 2, 1988)?

CONCLUSION

In all cases except those appealable to the Fourth Circuit, the Service will continue to calculate the section 6700 penalty for assessment and litigation purposes as the greater of (1) \$1,000 per sale or organization, subject to the administrative cap equal to gross receipts, or (2) 20% [10% for conduct occurring before July 19, 1984] of the gross income the promoter/salesman derived or was to derive from all sales or organizational activities.

DISCUSSION

On June 27, 1988, the Fourth Circuit Court of Appeals in Spriggs v. United States, No. 87-1651, slip op. (4th Cir. June 27, 1988) (unpublished opinion), aff'g 660 F. Supp. 789 (E.D. Va. 1987), affirmed the lower court's holding that the section 6700 penalty should be assessed on an annual basis as the greater of \$1,000 or 20% [10%] of the gross income the promoter/salesman earned from his overall activities of promoting abusive tax shelters for the year in question.

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The Department of Justice is continuing to litigate the Spriggs penalty computation issue in other circuits, e.g., Gates v. United States, 62 A.F.T.R. 2d para. 88-5036 (E.D. Ark. April 13, 1988), appeal pending (8th Cir.-No. 1765EA); Johnson v. United States, 677 F. Supp. 529 (E.D. Mich. 1988), appeal pending (6th Cir.-No. 88-1602); Bond v. United States, No. 97-1122-JGD (C.D. Cal. Dec. 22, 1987), appeal pending (9th Cir.-No. 88-5799). Accordingly, the Service will continue to calculate the section 6700 penalty for assessment and litigation purposes as the greater of (1) \$1,000 per sale or organization, subject to an administrative cap equal to gross receipts, or (2) 20% [10% for conduct occurring before July 19, 1984] of the gross income the promoter/salesman derived or was to derive from all sales or organizational activities. For those cases which are appealable to the Fourth Circuit, the Service should concede the Spriggs issue. For your information, we have attached (1) an advance copy of a litigation guideline memorandum, and (2) a copy of a November 21, 1988 memorandum. which outline the Service's position on assessment, litigation, and settlement of the Spriggs issue.

Should you have any further questions regarding this matter, please contact Jeff Rosenberg at (FTS) 566-3233.

MARLENE GROSS

By: Kathleen E. Whatley
KATHLEEN E. WHATLEY
Chief, Tax Shelter Branch

Attachments:
As stated.